IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3492 of 2004

with

CIVIL APPLICATION No 4594 fo 2004

For Approval and Signature:

HON'BLE MR.JUSTICE AKIL KURESHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

UNION BANK OF INDIA

Versus

K.R.AJWALIA

Appearance:

1. Special Civil Application No. 3492 of 2004

MRS SANGEETA N PAHWA for Petitioner No. 1

MR PARESH UPADHYAY for Respondent No. 1

2. Civil Application No.4594 of 2004

MR PARESH UPADHYAY for the applicant

MR SANGEETA N. PAHWA for the opponent.

CORAM : HON'BLE MR.JUSTICE AKIL KURESHI

Date of decision: 16/07/2004

ORAL JUDGEMENT

By order dated 19.3.2004, this Court had issued rule and granted ad interim relief to the extent that the respondent shall not be allowed to withdraw the amount of gratuity deposited by the petitioner. The respondent herein has filed Civil Application No.4594 of 2004 for vacating the ex-parte stay granted by this Curt on 19.3.2004. The learned advocates appearing for the parties have requested me that instead of deciding the Civil Application for vacating the interim relief, the main matter itself can be disposed of since the arguments to be advanced by both the sides for vacating/confirming the interim relief would be the same to be made in the main Special Civil Application. In view of the request of the learned advocates for the parties, the petition is heard and is being disposed of finally.

2. At the outset, brief facts necessary to appreciate the controversy involved can be stated. The respondent herein was working with the petitioner, Union Bank of India, as a Daftari. It is the case of the petitioner that on 8.4.96 when the respondent was discharging his duties as Daftari Peon at Bhavnagar, the respondent had accompanied one Shri Bhatt, Head Cashier with cash remittance from Bhavnagar Branch to the extension counter for the purpose of salary payment to the employees of the Municipal Corporation. It is the case of the petitioner that after collecting the cash from the cash department of the Bhavnagar Main Branch, the respondent for the purpose of personal cash withdrawal left the cash unattended, with the result one bag containing Rs.10 lacs was stolen. For the aforesaid misconduct, the petitioner issued a chargesheet dated 21.3.97 against the respondent stating, inter alia, that had the respondent been vigilant in ensuring the safety of the bag, for which purpose he had come to the Main Branch, the theft could have been prevented. He was, therefore, called upon to submit his explanation why appropriate disciplinary action should not be taken against him for his acts and omissions which led to a monetary loss of Rs.10 lacs to the Bank.

3. At the end of the departmental inquiry initiated pursuant chargesheet dated 21.3.97, the Disciplinary Authority imposed punishment of dismissal from service against the respondent for the proved misconduct and acts prejudicial to the interest of the Bank causing monetary loss to the Bank.

4. It is not in dispute that the respondent carried the order of dismissal from service in appeal before the Departmental Appellate Authority and the Appellate Authority by its order dated 14th December 2001, was pleased to reduce the penalty from that of dismissal to that of compulsory retirement "purely on humanitarian grounds". It is not in dispute that this order of penalty of compulsory retirement has not been carried in appeal by the respondent and the same has become final.

5. By order dated 29.8.2002, the Deputy General Manager (Terminal Benefits) of the petitioner Bank passed order directing forfeiture of full amount of gratuity of the respondent of Rs.1,05,117.50 ps. Being aggrieved by the said action of the petitioner of forfeiture of the entire amount of gratuity, the respondent approached the Controlling Authority under the Payment of Gratuity Act. The Controlling Authority by its order dated 26th August, 2003 was pleased to hold that the action of the petitioner in forfeiting the gratuity of the respondent is illegal and was pleased to hold that the respondent is entitled to be paid the amount of gratuity of Rs.1,05,117.50 ps and directed that the same be paid with simple interest at the rate of 10 per cent per annum calculated from the period between 30th December 2001 till the gratuity is paid.

6. Being aggrieved by the said order of the Controlling Authority under the Payment of Gratuity Act dated 26th August 2003, the petitioner preferred appeal before the Appellate Authority under the Payment of Gratuity Act. The Appellate Authority under the Payment of Gratuity Act by its order dated 24th February 2004 was pleased to reject the appeal filed by the petitioner. The petitioner, therefore, being aggrieved by the abovementioned orders, namely, order dated 26th August 2003 passed by the Controlling Authority and the order dated 24th February 2004 passed by the Appellate Authority has filed the present petition challenging the same.

7. The learned advocate for the petitioner-Bank has contended before me that the misconduct against the respondent has been conclusively proved for which a major penalty of compulsory retirement is imposed upon him. She has submitted that indisputably, the respondent has not challenged the order of compulsory retirement and the same has therefore become final. She therefore submits that the respondent is not entitled to claim any part of the gratuity and the petitioner, therefore, is justified

in ordering forfeiture of the entire amount of gratuity. The learned advocate for the petitioner has also contended before me that the Bank has framed Gratuity Rules and as per rule 3 of the Gratuity Rules, the Bank is entitled to forfeit the entire amount of gratuity in the present case. The learned advocate for the petitioner has also contended that no notice was required to be issued to the respondent before passing the order of forfeiture of gratuity since the respondent had sufficient notice during the course of the conduct of the inquiry. It is her contention that the chargesheet issued against the respondent clearly specified that the respondent is guilty of acts and omissions which caused loss of Rs.10 lacs to the Bank. On the basis of the chargesheet issued to the respondent, he came to be dismissed from service by the Competent Authority, which order came to be modified by the Appellate Authority on purely humanitarian considerations and the penalty was substituted to that of compulsory retirement. Learned advocate for the petitioner has, therefore, submitted that when the charges have been proved against the respondent and when the charge itself indicated that the respondent was guilty of acts and omissions which caused loss of Rs.10 lacs to the Bank, there was no further necessity of issuing fresh notice or giving an opportunity of being heard to the respondent before passing the order of forfeiture of gratuity. She, therefore, contends that in the facts of the present case, principles of natural justice should be held to have been substantially complied with. Her alternative contention is that the facts as they stand now are indisputable. The fact that the respondent is ordered to be compulsorily retired for the misconduct in question is not in dispute. The fact that the misconduct led to loss of cash of Rs.10 lacs to the Bank is also not in dispute. It is, therefore, the contention of the learned advocate for the petitioner that no useful purpose will be served in granting hearing to the respondent even if it is found that such a hearing was necessary. In short, her contention is that in the present case, granting of hearing at this stage, would be a "useless formality". As an alternative argument to the above contention, she submits that even now hearing can be granted to the respondent and technical defect such as not giving opportunity of being heard before passing the order of forfeiture should not be allowed to terminate the proceedings and that the proceedings could always be restarted from the stage where the defect is detected.

8. On the other hand, learned advocate Shri Upadhayay appearing for the respondent has contended

before me that admittedly, the respondent has not been heard by the petitioner-Bank before ordering forfeiture of his gratuity. In that view of the matter, he contends that the order of forfeiture was illegal and ab initio void. He, therefore, submits that the Authorities below were perfectly justified in setting aside the order of forfeitue passed by the Bank and no interference is called for in the present petition. He has relied upon a decision of this High Court reported in 1981 GLR 145 (Central Bank of India v. Ghanshyamlal Mohanlal Jani). The learned advocate for the respondent has also placed reliance upon a decision rendered by a learned single Judge of this High Court in Special Civil Application No.8091 of 1988 as well as the decision of a Division Bench of this High Court in Letters Patent Appeal No.730 of 2002 upholding the decision of the learned single Judge mentioned above. Learned advocate for the respondent has also strongly urged before me that the petitioner is guilty of suppression of material facts since, in his submission, the above decisions of learned Single Judge as well as the Division Bench in Letters Patent Appeal were passed in case of the very same Bank and as per the contention of the counsel for the respondent, under similar circumstances which, fact has not been stated by the petitioner in the present petition and ex-parte admission of the petition and ad-interim order were secured by the petitioner without disclosing the above decisions.

9. Learned advocate appearing for the parties agree that the petitioner Bank has formulated Gratuity Rules and they have made submissions regarding entitlement of gratuity of the respondent within the parameters of rule 3 of the Gratuity Rules. Rule 3 of the Gratuity Rules of the Bank reads as under:

> "In case of termination of service of the Member on account of misconduct, Gratuity payable either under Clause 1 or 2 hereof shall not be forfeited, except where such misconduct causes financial loss to the Bank (of which and of the amount of which the Bank shall be the sole Judge and its decision final) and in that case the forfeiture of the Gratuity shall be to extent of the financial loss only. The term "misconduct" for this purpose shall inter alia include any act or wilful omission or negligence causing any damage or loss to or destruction of property belonging to the Bank. Gratuity payable under Clause 1 hereof shall be forfeited if the services of the Member have been terminated for

his riotous or disorderly conduct or any other act of violence on his part or for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

A plain reading of the said rule makes it clear that in case of termination of service of the Member of the Bank, on account of misconduct, gratuity payable to him can be forfeited provided, inter alia, that in case of termination of service of the Member of the Bank on account of misconduct, the gratuity payable to him shall not be forfeited except where such misconduct causes financial loss to the Bank and in such case, the forfeiture shall be to the extent of financial loss only. It is also provided that the Bank shall be the sole judge of the amount of gratuity which is to be forfeited under the said rule. The rule further provides that the term 'misconduct' shall, inter ala, include any act or wilful omission or negligence causing any damage or loss or destruction of the property of the Bank.

10. One thing can be seen from the above is that any order that may be passed by the Bank in exercise of powers under Rule 3 of the Gratuity Rules would result into civil consequence against the employee concerned. In such a situation, though it has not been provided specifically under the said rule for granting hearing to the employee before an order of forfeiture is passed, principles of natural justice would have to be followed before passing any such order. In other words, though rule does not specifically require issuance of a notice or giving an opportunity of being heard to an employee, such a requirement can be read into the rule, failing which the rule would be rendered vulnerable to attack of unconstitutionality. In AIR 1981 SC 818 (Swedeshi Cotton Mills v. Union of India), the Hon'ble Supreme Court held that where a statute does not in terms exclude the rule of prior hearing, but contemplates a post-decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi alteram partem rule at the pre-decisional stage. Conversely, if the statute conferring the power is silent with regard to giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of a grave nature and no full review or appeal on merits against the decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing. Para 42 of the said judgment can be reproduced

herein :

"42. In short the general principle - as distinguished from an absolute rule of uniform application - seems to be that where a statute does not, in terms, exclude this rule of prior hearing but contemplates a post decisional hearing amounting to a full review of the original order on merits, then such a statute would be construed as excluding the audi-alteram partem rule at the pre-decisional stage. Conversely, if the statute conferring the power is silent with regard to the giving of a pre-decisional hearing to the person affected and the administrative decision taken by the authority involves civil consequences of grave nature, and no full review or appeal on merits against the decision is provided, courts will be extremely reluctant to construe such a statute as excluding the duty of affording even a minimal hearing shorn of all its formal trappings and dilatory features at the pre-decisional stage, unless, viewed pragmatically, it would paralyse the administrative process or frustrate the need for utmost promptitude. In short this rule of fair play "must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands". The Court must make every effort to salvage this cardinal rule to the maximum extent possible with situational modifications. But, to recall the words of Bhagwati, J. the core of it must, however, remain, namely that the person affected must have reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise."

In AIR 1988 SC 686 (K.I.Shephard v. Union of India) the Hon'ble Supreme Court held that fair play is a part of public policy and is a guarantee for justice to citizens. The following observations of the Hon'ble Supreme Court in this regard can be noted:

"12. Mullan in 'Fairness: The New Natural Justice' has stated:-

"Natural justice co-exists with or reflected, a wider principle of fairness in decision making and that all judicial and administrative decision making and that all judicial and administrative

decision makers had a duty to act fairly"

In the case of State of Orissa V Dr. Miss Binapani Dei (1967) 2 SCA 625 = (AIR 1967 SC 1269 at page 1272) this Court observed:

"It is true that the order is administrative in character but even an administrative order which involves civil consequences as already stated, must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken; the High Court was, in our judgement, right in setting aside the order of the State."

In A.K. Kraipak V Union of India (1970 (1) SCR 457 = (AIR 1970 SC 150), a Constitution Bench quoted with approval the observations of Lord Parker in Re: K(H)(An infant [supra]) Hegde, J. speaking for the Court stated at p.p 156 - 157 of AIR:-

"Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably. But in the course of years many more subsidiary rules came to be added to the rules of natural justice. Till very recently it was the opinion of the Courts that unless the authority concerned was required by the law under which it functioned to act judicially, there was no room for the application of the rules of natural justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice, one fails to see why those rules should be made inapplicable to administrative enquiries. Often - times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision if the aim of both quasi judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far

reaching effect than a decision in a quasi-judicial enquiry".

These observations in Kraipak's case were followed by another Constitutional Bench of this Court in Chandra Bhavan Boarding and Lodging, Bangalore V. State of Mysore (1970) 2 SCR 600 = (AIR) 1970 SC 2042). In Swadeshi Cotton Mills V. Union of India (1981 2 SCR 533) = (AIR 1981 SC 818), a three - Judge Bench of this Court examined this aspect of natural justice. Sarkaria, J. whose spoke for the Court, stated (at p.828 of AIR):-

"During the last two decades the concept of natural justice has made great strides in the realm of administrative law. Before the epoch-making decision in the House of Lords in Ridge V. Baldwin, (1964 AC 40) it was generally thought that the rules of natural justice apply only to judicial or quasi-judicial proceedings; and for the purpose, whenever a breach of rule of natural justice was alleged, Courts in England used to ascertain whether the impugned action was taken by the statutory authority or Tribunal in the exercise of its administrative or quasi-judicial power. In India also, this was the position before the decision of this Court in Dr. Binapani Dei's case, (AIR 1967 SC 1269) (supra); wherein it was held that even an administrative order or decision in matters involving civil consequences has to be made consistently with the rules of natural justice. This supposed distinction between quasi-judicial and administrative decisions which was perceptibly mitigated in Binapani Dei's case (supra) was further rubbed out to a vanishing point in A.K Kraipak's case, AIR 1970 SC 150 (supra) ....."

On the basis of these authorities it must be held that even when a State agency acts administratively, rules of natural justice would apply. As stated, natural justice generally requires that persons liable to be directly affected by proposed administrative acts, decisions or proceedings be given adequate notice of what is proposed so that they may be in a position (a) to make representations on their own behalf; (b) or to appear at a hearing or enquiry

(if one is held); and (c) effectively to prepare their own case and to answer the case (if any) they have to meet.

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15. Fair play is a part of the public policy and is a guarantee for justice to citizens. In our system of Rule of Law, every social agency conferred with power is required to act fairly so that social action would be just and there would be furtherance of the well-being of the citizens. The rules of natural justice have developed with the growth of civilisation and the content thereof is often considered as a proper measure of the level of civilisation and Rule of Law prevailing in the community. Man within the social frame has struggled for centuries to bring in to the community the concept of fairness and it has taken scores of years for the rules of natural justice to conceptually enter in to the field of social activities. We do not think in the facts of the case there is any justification to hold that rules of natural justice have been ousted by necessary implication on account of the time frame. On the other hand we are of the view that the time limited by statute provides scope for an opportunity to be extended to the intended excluded employees before the scheme is finalised so that a hearing commensurate to the situation is afforded before a section of the employees is thrown out of employment."

In AIR 1990 SC 1402 (Neelima Misra v. Harinder Kaur Paintal), the Hon'ble Supreme Court observed that an administrative order which involves civil consequences must be made consistently with the rule expressed in the Latin Maxim audi alteram partem. In para 22 of the said decision, the Hon'ble Supreme Court made the following observations

"22. An administrative order which involves civil consequences must be made consistently with the rule expressed in the Latin Maxim audi alteram partem. It means that the decision maker should afford to any party to a dispute an opportunity to present his case. A large number of authorities are on this point and we will not

> travel over the field of authorities. What is now not in dispute is that the person concerned must be informed of the case against him and the evidence in support thereof and must be given a fair opportunity to meet the case before an adverse decision is taken. Ridge v. Baldwin, (1963 (2) All ER 66) (supra); State of Orissa v. Dr. Binapani Dei [1967] 2 SCR 625 : (AIR 1967 SC 1269).

From the above decisions of the Hon'ble Supreme Court it can be seen that to meet with the requirements of audi alteram partem, the employee shall have to be afforded an opportunity to meet with the case before an adverse decision is taken and though the rule itself does not specifically provide for the requirement of hearing, principles of natural justice can be read into the rule. In view of this discussion, I find that the respondent was required to be heard before passing any adverse order against him in exercise of powers under rule 3 of the Gratuity Rules.

11. The question, however, is whether the petitioner had substantially complied with the requirement as contended by the learned advocate for the petitioner and if not, whether requirement of hearing to the respondent would be a "useless formality" as suggested by her.

12. From the facts of the case narrated above, I am unable to agree with the contention of the learned advocate for the petitioner that the petitioner had substantially complied with the requirements of hearing and that no opportunity of hearing was required to be given to the respondent before passing the order of forfeiture of the gratuity. It is true that a chargesheet was served against the respondent in which the allegations with respect to misconduct were included. It is also true that in the chargesheet itself, the petitioner had mentioned that the act and omission of the respondent had caused loss of Rs.10 lacs to the Bank. This, however, by itself would not be a sufficient ground to come to the conclusion that the respondent did not deserve an opportunity of being heard before passing the order of forfeiture of gratuity. The chargesheet issued against the respondent was for the purpose of calling upon him why penal action should not be taken against him for the alleged gross misconduct committed by him. The entire scope and focus of the inquiry was different from one which would have to be initiated before passing any order forfeiting gratuity partially or in full. The respondent was never put to notice that his conduct would

result into forfeiture of his gratuity. In that view of the matter, I am of the opinion that the respondent was not given a notice or hearing before passing the order of forfeiture of gratuity which was essential in the facts of the present case.

13. This brings me to the alternative contention of the learned advocate for the petitioner that it would be a "useless formality" since the respondent has not shown any prejudice in not being issued a notice before the order of forfeiture of gratuity was passed. In the decision reported in AIR 1994 SC 1074 (Managing Director, ECIL v. B. Karunakar), the Hon'ble Supreme Court while considering the effect of the decision of the Supreme Court in Mohd. Ramzan Khan's case holding that a delinquent officer is entitled to a copy of the Inquiry Officer's report before the Disciplinary Authority takes a final decision thereon, came to the conclusion that in all cases where the Inquiry Officer's report was not furnished to the delinquent employee, Courts and Tribunals should cause the copy of the report to be furnished to the aggrieved employee and give the employee an opportunity to show how his or her case was prejudiced because of the non-supply of the report.

14. In yet another decision reported in AIR 1996 SC 1669 (State Bank of Patiala v. S.K.Sharma), the Hon'ble Supreme Court again considering the issue of non-supply of Inquiry Officer's report to a delinquent during the course of a department inquiry held, inter alia, that order imposing punishment should not be set aside automatically and the Court or the Tribunal should enquire whether the provision violated is of a substantive nature or whether it is procedural in character. It further held that order passed in violation of a procedural provision can be set aside only where such violation has occasioned prejudice to the delinquent employee.

15. In a decision reported in AIR 2003 SC 2041 (Canara Bank v. Debasis Das), the Hon'ble Supreme Court considered the concept of "useless formality theory". In para 22 of the said decision, following observations have been made :

"22. What is known as 'useless formality theory' has received consideration of this Court in M.C Mehta V. Union of India (1999 (6) SCC 237). It was observed as under:-

"Before we go into the final aspect of this

contention, we would like to state that case relating to breach of natural justice do also occur where all facts are not admitted or are not all beyond dispute. In the context of those cases there is a considerable case law and literature as to whether relief can be refused even if the Court thinks that the case of the applicant is not one of "real substance" or that there is no substantial possibility of his success or that the result will not be different, even if natural justice is followed (see Mulloch V. Aberdeen Corpn. (1971) 2 All ER 1278 HL) (per Lord Reid and Lord Wilberforce), Glynn V. Keele University (1971) 2 All ER 89) Cinnamond V. British Airports Authority (1980) 2 All ER 368 CA) and other cases where such a view has been held. The latest addition to this view is R.V Ealing Magistrate's Court, ex p.Fannaran (1996 [8] Admn. LR 351, 358) (C d.Smith, Suppl. p.89 [1998]) where Straughton L.J. held that there must be 'demonstrable beyond doubt' that the result would have been different. Lord Woolf in Lloyd V. McMohan (1987 (1) All ER 1118 CA) has also not disfavoured refusal of discretion in certain cases of breach of natural justice. The New Zealand Court in McCarthy v. Grand (1959 NZLR 1014) however goes halfway when it says that (as in the case of bias), it is sufficient for the applicant to show that there is 'real likelihood not certainty of prejudice'. On the other hand, Garner Administrative Law (8th Edition 1996 P.271-72) says that slight proof that the result would have been different is sufficient. On the other side of the argument, we have apart from Ridge V. Baldwin (1964 AC 40 = (1963 2 All ER 66, HL), Megarry J. in John V. Rees (1969 (2) All ER 274) stating that there are always 'open and shut cases' and no absolute rule of proof of prejudice can be laid down. Merits are not for the court but for the authorities to consider. Ackner, J. has said that the 'useless formality theory' is a dangerous one and, however inconvenient, natural justice must be followed. His Lordship observed that' convenience and justice are often not on speaking terms'. (emphasis supplied) More recently, Lord Bingham has depricated the 'useless formality theory' in R. V. Chief Constable of the Thames Valley Police Forces, ex. p. Cotton (1990 IRLR 344) by giving six reasons (see also his article 'should public law remedies be discretionary?' 1991 PL

p.64) A detailed and emphatic criticism of the useless formality theory has been made much earlier in 'Natural Justice, Substance or Shadow' by Prof. D.H Clark of Canada (see 1975 PL pp 27-63) contending that Malloch (supra) and Glynn (supra) were wrongly decided. Founkes (Administrative Law 8th Edition 1996 P.323), Craig (Administrative Law 3rd Edition p. 596) and others say that the Court cannot pre-judge parties to be decided by the decision making authority. De Smith (5th Edition 1994 paras 10.031 to 10.036) says Courts have not yet committed themselves any one view though discretion is always with the Court. Wade (Administrative Law 5th Edition 1994 pp.526-530) says that while futile writs may not be issued, a distinction has to be made according to the nature of the decision. Thus, in relation to cases other than those relating to admitted or indisputable facts, there is a considerable divergence of opinion whether the applicant can be compelled to prove that the outcome will be in his favour or he has to prove a case of substance or if he can prove 'a real likelihood' of success or if he is entitled to relief even if there is some remote chances of success. We may, however, point out that even in cases where the facts are not all admitted or beyond dispute there is a considerable unanimity that the Courts can, in exercise of their 'discretion' refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. We may also state that there is yet another line of cases as in State Bank of Patiala V. S.K. Sharma (1996 3 SCC 364); Rajendra Singh V. State of M.P (1996 5 SCC 460) that even in relation to statutory provisions requiring notice, a distinction is to be made between cases where the provision is intended for individual benefit and where a provision is intended to protect public interest. In the former case, it can be waived while in the case of the latter it cannot be waived.

We do not propose to express any opinion on the correctness or otherwise of the 'useless formality theory' and leave the matter for a decision in an appropriate case inasmuch as the case before us 'admitted and indisputable' facts show that grant of writ will be in vain as pointed out by Chinnappa Reddy, J."

In AIR 1977 SC 965 (Board of Mining Examination v. Ramjee), the Hon'ble Supreme Court made the following observations:

> "..... Natural justice is no unruly horse, no lurking land mine, nor a judicial cure-all. If fairness is shown by the decision-nmaker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditions by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. We can neither be finical nor fanatical but should be flexible yet firm in this jurisdiction. No man shall be hit below the belt - that is the conscience of the matter."

16. From the above guiding principles, it would be necessary to decide, in the facts of the present case, whether it will be a "useless formality" to insist that the respondent should have been given an opportunity of being heard before adverse order was passed against him as no prejudice is caused by not affording such an opportunity, as is contended by the learned advocate for the petitioner. In my opinion, such a view is not possible to be taken in the present case. As discussed earlier, the respondent was heard only at the stage of departmental inquiry where the entire focus was on the misconduct and what punishment is to be imposed on the respondent for his alleged misconduct. What was the role played by the respondent, who are the other persons involved which caused loss to the tune of Rs.10 lacs to the Bank, what were the posts held by such persons and considering all these and other relevant aspects of the matter, what would be the amount, if any, of the gratuity of the respondent which is required to be forfeited, are the questions required to be considered by the Competent Authority and such a decision cannot be arrived at without giving a fair opportunity to the respondent to be heard in this regard. Rule 3 of the Gratuity Rules itself suggests that the amount of gratuity to be withheld is to be decided solely by the Bank. By no stretch of imagination can it be argued that in every case of loss of property, there would be automatic and complete forfeiture of gratuity. The rule itself, in my opinion, can be read into giving sufficient discretion to the Competent Authority to forfeit in part or full amount of gratuity considering the facts and circumstances of a

given case. In my view, therefore, requirement of hearing to the respondent would not be an empty formality which can be dispensed with.

17. This brings me to yet another aspect of the matter, namely, whether such an opportunity can be permitted to the petitioner at this stage. It is by now well settled that whenever an order is being struck down for violation of principles of natural justice, order stands vacated, but proceedings are not terminated. The Hon'ble Supreme Court in AIR 2003 SC 2041, has observed that when an order is struck down as invalid being in violation of principles of natural justice, there is no final decision of the case and fresh proceedings are left open. All that is done is to vacate the order assailed by virtue of its inherent defect, but the proceedings are not terminated. This was also the view of the Hon'ble Supreme Court in the decision of the case of Managing Director, ECIL (supra) as well as in the case of State Bank of Patiala (supra).

18. I also find that in the decisions relied upon by the learned advocate for the respondent, this Court had held in favour of the employee on the ground that ascertainment of financial loss caused to the bank which is a pre-condition to the forfeiture of the gratuity to the extent of financial loss only, is not established since financial loss caused to the bank was not worked out. I also find that the Division Bench in the decision rendered in Letters Patent Appeal No.730 of 2002 had observed that the impugned orders were made in the year 1988 and at a distant point of time, it would not be proper to allow the Bank to make fresh orders. In the present case, however, no such time lag is to be found. In the present case, the order of forfeiture of gratuity was passed in the year 2002 only and the respondent cannot rely on the observations made in the said decision.

19. I also do not find that the petition is required to be rejected solely on the ground of suppression of material facts as suggested by the respondent counsel. Though it is true that the decisions relied upon by the learned advocate for the respondent involved the very same Bank, in the present case, the petitioner Bank had come with a theory that in view of the peculiar facts of the case wherein the respondent was ordered to be compulsorily retired pursuant to the departmental inquiry, the foundational charge of which was that his negligent act had caused loss of Rs.10 lacs to the Bank, no hearing was necessary before forfeiting the gratuity.

In that view of the matter, I do not find that the petitioner seriously misled the Court by not referring to the said decisions and it would not be possible for me to reject the petition only on this ground.

20. In conclusion, therefore, I find that the order of forfeiture passed by the petitioner was in violation of principles of natural justice since no hearing was granted to the respondent before passing the said order. The authorities below therefore did not commit any illegality in setting aside the said order. I, therefore, concur with the view of the authorities below under the Payment of Gratuity Act that the order dated 29.8.2002 passed by the petitioner ordering forfeiture of the entire amount of gratuity of the respondent was not lawful, however for different reasons which are narrated above. I, therefore, find that the petition is required to be dismissed. However in view of the observations made hereinabove, I am of the opinion that nothing that has been said by the authorities under the Payment of Gratuity Act nor my action of rejecting of the petition shall come in the way of the petitioner in passing fresh orders in accordance with law after affording a reasonable opportunity to the respondent of being heard regarding forfeiture of gratuity.

21. In view of the above discussion, the petition stands rejected. Rule is discharged. Ad-interim relief granted earlier stands vacated.

22. In view of the order passed in the Special Civil Application, the Civil Application does not survive and the same stands disposed of accordingly.

(Akil Kureshi, J.)
(vjn)